

402 W. Washington Street, Rm. W-256
Indianapolis, IN 46204-2641

16 April 2003

Water Docket
Environmental Protection Agency
Mailcode 4101T
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Attention Docket ID No. OW-202-0050

Re: DNR #10001 - Advance notice of proposed rulemaking on the Clean Water Act regulatory definition of "waters of the United States"

Dear Sir or Madam:

The Indiana Department of Natural Resources has reviewed the above referenced notice and we offer the following comments for your information and consideration.

Our agency has serious concerns for the protection of waters in our state as a result of the SWANCC decision and the interpretation and reaction to that decision by the U.S. Army Corps of Engineers and Environmental Protection Agency. Specifically, isolated wetlands are no longer being regulated under the Clean Water Act and our state regulatory agency is struggling with providing protection for these valuable natural resources.

We feel that isolated wetlands should be included in the definition of "waters of the United States", and should be regulated under the Clean Water Act. These waters do provide interstate benefits in regard to recreational use, water quality, and for a variety of animals, not strictly migratory birds, which recognize no state boundary lines. These wetlands provide nutrient and sediment filtering of water before it enters groundwater systems and surface waterways and waterbodies that flow into other states. Many of the isolated wetlands remaining in Indiana are within the area of past glacial activity. This has resulted in unique bogs and fens found only in this region and which are habitat to numerous state and federally listed plants and animals.

Isolated wetlands in general are required for numerous animal species sometime during their life histories. Isolated wetlands are essential to amphibians which are struggling already on a population scale. The Sandhill Crane, an Indiana state endangered species, uses isolated wetlands for nesting, as do many other migratory birds. Regardless of the court decision in SWANCC, isolated wetlands are a needed habitat feature for migratory birds, many of these being very secretive and elusive such as night herons, bitterns, rails, and a variety of waterfowl. There are also insects that require the type of water found in isolated wetlands. There is a lengthy list of benefits isolated wetlands provide for the numerous fish and wildlife species that rely upon their existence. Indiana's natural resources, and human resources, can not afford to lose any more isolated wetlands to conversion to other land uses.

We also support Clean Water Act jurisdiction over headwater tributaries including those that may be intermittent. Again, these waters are the beginning of the vast major river systems that cross this country. The impacts occurring in these headwaters have tremendous effects on water quality and natural resources in waterways and waterbodies that cross state boundary lines. Headwater streams are vital to spawning and early growth for many fish species. Indiana has a multi-million dollar salmonid fishery associated with Lake Michigan and its cold water tributary streams. These fish are using some of the smallest of tributaries in this system. To be certain, this fishery draws support from recreationists from throughout the United States.

The quality of both isolated wetlands and headwater tributary streams and the habitat provided are very important to the hunting, fishing, and wildlife viewing public, some of which comes from outside of our state, that economically supports the fish and wildlife resources dependent on these waters. Seventy-five Indiana charter boat captains make a living by taking people fishing for hire on state waters, typically charging several hundred dollars a day as a fishing guide. The number of charter licenses sold increases annually. Wetlands regulate flood flows and protect water quality for fisheries, which are used by 874,000 recreational anglers who spent \$519 million in 2001. The states of Indiana and Michigan have worked together on a very significant interstate project to raise \$15 million in federal funds and private contributions to develop a world class trout and salmon fishery that annually generates about \$6 million in income to local communities. These sensitive species are entirely dependent on filtering wetlands and headwaters to maintain a high level of water quality in the receiving streams. Indiana wetlands support waterfowl for 19,000 licensed duck hunters and 2,500 fur trappers, who spent over \$3 million in 2001. Over 60 rare and endangered species in Indiana are dependent on wetlands for some or all of their lifecycle.

The Department of Natural Resources administers permits for the Flood Control Act (IC 14-28-1), the Lakes Preservation Act (IC 14-26-2), and the Lowering of Ten Acre Lakes Act (IC 14-26-5), where wetland protection is currently afforded under their authority. The jurisdictional limits of this protection are limited, however, to the 100 year flood elevation on waterways with a drainage area greater than one square mile; the shoreline and lakebed of Indiana's public freshwater lakes; and ditches and drains within one-half mile from a public freshwater lake that is at least ten acres in size, respectively. The Flood Control Act does not apply to county drainage board work on open, regulated drains of less than ten miles in length, therefore allowing county drainage boards to perform maintenance and restoration work without DNR permitting review on these waterways.

Wetlands within the department's jurisdictional area under the above statutes would likely be considered associated with these waterways and lakes, rather than isolated. These wetlands are also provided protection under the Clean Water Act and that protection should continue. The department does not have statutes regarding protection of isolated wetlands.

Intermittent and tributary streams often do not have a drainage area greater than one square mile. Therefore, these waterways are not regulated by the department under current state law. These waterways provide valuable habitats for macroinvertebrates, fish spawning, and young fish of various species. Numerous wildlife species rely on these stream corridors for food, cover, nesting, and other habitat requirements. Protection under the Clean Water Act is needed for these valuable fish and wildlife habitat areas.

Many of the open, "regulated drains" less than ten miles in length were once natural headwater streams that have been cleared and dredged for drainage. These headwater streams are extremely important to the overall aquatic community as well as providing terrestrial habitats and food sources. These waterways are afforded protection under the Clean Water Act at this time. Since the State has no authority over these waterways, without the Clean Water Act Authority, there would be no protection for these important habitats at all.

Advance Notice of Proposed Rulemaking

April 16, 2003

Page 3

The ability of the State of Indiana to regulate and protect the majority of isolated wetlands is of concern. Our Indiana Department of Environmental Management, which is responsible for Section 401 Water Quality Certification in the state, is attempting to regulate these waters and is now involved in a lawsuit in this regard. Bills were introduced in the Indiana General Assembly this year that would have given that agency the jurisdiction to regulate these waters, but, the issue is so contentious that it is uncertain whether these bills will become law.

Our agency appreciates this opportunity to be of service. Please do not hesitate to contact Christie Kiefer, Environmental Coordinator, at (317) 232-4160 or toll free at 1-877-928-3755 if we can be of further assistance.

Sincerely,

Paul Ehret
Deputy Director